HUSBAND AND WIFE — ANTENUPTIAL AGREEMENT — CONSTRUCTION — FAILURE OF CONSIDERATION. — Under an antenuptial agreement made in New York, where the parties were domiciled, the intended wife, in case she kept her promise to marry, was to be left certain securities by the husband's will. Several years after the marriage she left him, obtained a divorce in Missouri on a ground not recognized in New York, and remarried. When her former husband died, he bequeathed the securities to a third party. The wife claims them under the antenuptial agreement. *Held*, that she is not entitled to them. *New Jersey Title Guaranty & Trust Co.* v. *Parker*, 96 Atl. 574 (N. J.)

Marriage or a promise to marry is a valuable consideration. *Smith* v. *Allen*, 5 Allen (Mass.) 454; *Magniac* v. *Thompson*, 7 Peters (U. S.) 348, 393. And a promise for valuable consideration to make a specific testamentary disposition will be enforced by imposing a trust upon persons claiming under the deceased promisor. *Rivers* v. *Executors of Thomas Rivers*, 3 Desauss. (S. C.) 190; *Emery* v. *Darling*, 50 Oh. St. 160, 33 N. E. 715. See *Synge* v. *Synge*, [1894] 1 Q. B. 466, 470, 471. But where the essential equivalent demanded in return for the promise is not received, there is a failure of consideration, and the promise becomes unenforceable. *Cf. Rice* v. *Goddard*, 14 Pick. (Mass.) 293; *Jones* v. *Buffum*, 50 Ill. 277. Now, it is arguable that the equivalent demanded in the principal case was the continuance of the marriage relation, at least until dissolved on some ground authorized by the law of New York. See *York* v. *Ferner*, 59 Ia. 487, 489; *Barclay* v. *Waring*, 58 Ga. 86, 93. But even so, as entering the marital relationship is so substantial a part of the contemplated consideration in these contracts, it is doubtful whether a subsequent separation, especially after several years, is a sufficiently essential failure to render the agreement unenforceable. Thus it is generally held that neither misconduct after the marriage nor subsequent divorce will prevent the guilty party from enforcing an antenuptial agreement or enable the injured party to set aside a marriage settlement. *Moore* v. *Moore*, 1 Atk. 272; *Fitzgerald* v. *Chapman*, 1 Ch. Div. 563; *Evans* v. *Carrington*, 2 De G. F. & J. 481; *cf. Smith* v. *Allen*, *supra*. *Contra*, *York* v. *Ferner*, *supra*. This is the more clearly correct if entering into the marriage relation is the only consideration contemplated. See *Moayon* v. *Moayon*, 114 Ky. 855, 871, 872, 72 S. W. 33, 37. Such would seem to be the reasonable construction of the agreement in the principal case. Again if both parties know that the marriage may be invalid, even invalidity does not cause a failure of consideration. *Ogden* v. *McHugh*, 167 Mass. 276, 45 N. E. 731.

ILLEGAL CONTRACTS — PUBLIC POLICY — AGREEMENT TO SUE IN CERTAIN COURTS ONLY. — A contract between a domestic and a foreign corporation contained a stipulation that no action should be maintainable against the latter except in certain courts of the foreign state. The domestic corporation now sues in the courts of its own state. *Held*, that the stipulation is invalid. *Nashua River Paper Co.* v. *Hammermill Paper Co.*, 111 N. E. 678 (Mass.).

The invalidity of agreements seeking wholly to deprive any sovereign of jurisdiction is settled by an almost unbroken line of authority. *Ins. Co.* v. *Morse*, 20 Wall. (U. S.) 445. See 1 PAGE, CONTRACTS, § 347. *Cf. United States, etc. Co. v. Trinidad, etc. Co.*, 222 Fed. 1006, 1007. Since the underlying policy is the insistence of the sovereign upon its right ultimately to determine disputes in its courts, a partial limitation upon that right, if reasonable, has not been held objectionable. So, a contract shortening the period of limitations is valid. *Fullam* v. *New York Union Ins. Co.*, 7 Gray (Mass.) 61; *Northwestern Ins. Co.* v. *Phœnix Oil, etc. Co.*, 31 Pa. 448. *Contra*, *French* v. *Lafayette Ins. Co.*, 5 McLean (U. S.) 461. Similarly a contract limiting the right of appeal is sustained. *Hostetter's Appeal*, 92 Pa. 132. See *Stedeker* v. *Bernard*, 93 N. Y. 589, 591. But a limitation of action to certain counties of a state has been held un-

reasonable. *Savage* v. *Savings Ass'n*, 45 W. Va. 275, 31 S. E. 991; *Nute* v. *Hamilton Mut. Ins. Co.*, 6 Gray (Mass.) 174. But *cf. Greve* v. *Aetna Live Stock Ins. Co.*, 81 Hun 28, 30 N. Y. Supp. 668. Clearly this principle renders general arbitration agreements ineffectual to oust the courts of jurisdiction, however unfortunate it may be to discourage the settlement of disputes out of court. See 1 PAGE, CONTRACTS, § 348. But where the contract calls for performance of a duty to be fixed by arbitration, the clause is valid, as arbitration is then a condition precedent to any cause of action at all. *Hamilton* v. *Ins. Co.*, 136 U. S. 242. See A. C. Burnham, "Arbitration as a Condition Precedent," 11 HARV. L. REV. 234. Mere words, however, will not make it a condition precedent when the arbitration serves not to define the duty but to determine its infringement. See *Meacham* v. *Jamestown, F. & C. R. Co.*, 211 N. Y. 346, 352, 105 N. E. 653, 655. In Massachusetts, the doctrine of *Nute* v. *Hamilton Mut. Ins. Co.*, *supra*, invalidating territorial limitations on suit, had been seriously undermined. *Mittenthal* v. *Mascagni*, 183 Mass. 19, 66 N. E. 425; *Daley* v. *People's Bldg., etc. Ass'n*, 178 Mass. 13, 59 N. E. 452. The present case, however, brings Massachusetts once more into harmony with the generally accepted doctrine.

INSURANCE — EMPLOYER'S LIABILITY INSURANCE — LIABILITY OF INSURER BEFORE PAYMENT BY EMPLOYER. — An employer took out insurance against losses resulting from injuries to employees. In a suit defended by the insurance company the plaintiff recovered a judgment against the employer for death of her husband. As the employer was totally insolvent, the plaintiff took an assignment of the policy and now sues the company, admitting that the policy is for reimbursement only. *Held*, that she may recover. *Davies* v. *Maryland Casualty Co.*, 154 Pac. 1116 (Wash.).

When, as in the principal case, the policy is indisputably an agreement merely to reimburse the employer for losses actually suffered and not to exonerate him from liability, a payment by the employer is a condition precedent to a right of action on the policy which his insolvency makes impossible of performance. *Frye* v. *Bath Gas & Electric Co.*, 97 Me. 241, 54 Atl. 395; *Cushman* v. *Carbondale Fuel Co.*, 122 Iowa, 656, 98 N. W. 509. See *Puget Sound Imp. Co.* v. *Frankfort Marine, etc. Co.*, 52 Wash. 124, 131, 100 Pac. 190, 193. A feeling of sympathy for the employee, however, has led to a tendency to construe the policy as one for exoneration, whenever possible. Thus, when the policy provides that the insurer shall defend suits against the employer, express provisions that the policy is for reimbursement of actual loss have been held to apply only to liability incurred without suit, on the theory that such action is inconsistent with a mere agreement to reimburse. *Sanders* v. *Frankfort, etc. Co.*, 72 N. H. 485, 57 Atl. 655; *cf. Campbell* v. *Maryland Casualty Co.*, 52 Ind. App. 228, 97 N. E. 1026. But if, as in the principal case, the policy is construed as one for reimbursement only, it is difficult to see how the mere fact that the insurer attempts to protect his contingent liability by defending the suit can estop him from asserting the existence of this condition precedent. *Carter* v. *Ætna Life, etc. Co.*, 96 Kan. 275, 91 Pac. 178. A more difficult question arises when the employer is not totally insolvent, but is bankrupt and paying a dividend. Logically, the employee should be given his dividend along with the other creditors, the amount paid to him should be collected from the insurance company, a dividend in this should be given to the employee, and this process of payment and collection continued indefinitely. *Cf. Royal Bank of Scotland* v. *Commercial Bank of Scotland*, 7 A. C. 366. But to perform this infinite series of transactions would be impossibly cumbersome, while to compute the result and assess compensation from the insurance company for all these sums at a single transaction would involve the logical inconsistency of forcing indemnity at a time when the employer could not have paid the whole amount assessed. An Amer-